FILE COPY

SUPREME COURT, U.S.
FILED
NOV 1 1930
CHARLES ELMORE CROPLEY

Nos. 400, 412, 416, 508, 519, 529

In the Supreme Court of the United States

OCTOBER TERM, 1930

MASCOT OIL COMPANY, INC., PETITIONER, *v.* THE UNITED STATES

ROY & TITCOMB, INC., PETITIONER, *v.* THE UNITED STATES

THE UNITED STATES, PETITIONER, *v.* WYMAN, PARTRIDGE & COMPANY

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER, v. ERIE COAL & COKE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

AMERICAN GLUE COMPANY, PETITIONER, *v.* THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

LAURA H. JENNINGS, PETITIONER, *v.* CHARLES W. ANDERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 400

MASCOT OIL COMPANY, INC., PETITIONER, *v.* THE United States

No. 412

ROY & TITCOMB, INC., PETITIONER, *v.* THE UNITED States

No. 416

THE UNITED STATES, PETITIONER, *v.* WYMAN, Partridge & Company

---

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania petitioner, *v.* Erie Coal & Coke Company

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

21005—30

No. 519

AMERICAN GLUE COMPANY, PETITIONER, *v.* THE United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 529

LAURA H. JENNINGS, PETITIONER, *v.* CHARLES W. Anderson

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO ADVANCE

The Solicitor General moves to advance the above-entitled cases for hearing to follow immediately No. 463, *Daniel Reeves, Inc., Petitioner,* v. *Anderson.* The above-entitled cases all involve the same question as that involved in cases Nos. 36, 65, 104, 105, 323, 337, and 463, which have been assigned for hearing consecutively in that order. This question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, should be construed to deprive the taxpayers of the right which they assert that they otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired,

and, if so construed, whether this section violates the Fifth Amendment.

In addition, each of the above-entitled cases (except No. 529) presents facts which raise additional questions which are closely connected with the question stated.

The decisions in cases Nos. 36, 65, 104, 105, 323, 337, and 463 will not be conclusive of all the questions involved in any of the above-entitled cases except No. 529. All of the questions involved in all of these cases are closely related. The convenience of the Court and of the parties will be served if the above-entitled cases are heard immediately after No. 463.

In view of the nature of the questions raised in the various cases, we suggest that the above-entitled cases be assigned in the following order: No. 529, No. 519, No. 416, No. 508, No. 400, No. 412. In Nos. 416, 508, 400, and 412 the collection was made after the passage of the Revenue Act of 1926 and before the passage of the Revenue Act of 1928, and in them the taxpayers rely upon Section 1106 of the 1926 Act. This is not involved in No. 529 or No. 519.

The petitions in No. 508, *Heiner, Petitioner,* v. *Erie Coal & Coke Company;* No. 519, *American Glue Company, Petitioner,* v. *United States,* and No. 529, *Jennings, Petitioner,* v. *Anderson,* have not yet been granted, and the motion as to those cases is, of course, subject to the granting of the petitions.

All of the opposing counsel concur in this motion.
Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Office Supreme Court, U.
FILED
SEP 24 1930
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States.

OCTOBER, TERM, 1930.

No. 400.

MASCOT OIL COMPANY, INC., PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

THEODORE B. BENSON,
Counsel for Petitioner.

(35,322)

INDEX.

	Page.
I. Opinion of the court below	1
II. Jurisdiction	1
III. The Facts	2
IV. Statutes involved	2
V. Specification of errors	2
VI. Argument	5
Summary of argument	5
Argument	7
VII. Conclusion	13

CASES CITED.

Aiken *v.* Commissioner, S. Ct. No. 69, Oct. Term, 1930	10
Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346, 47 S. Ct. 389	8
Brown, W. P. & Sons Lumber Co. *v.* Commissioner, S. Ct. No. 115, Oct. Term, 1930	10
Ellay Company *v.* Bowers, 25 F. (2d) 637, certiorari denied 48 S. Ct. 601	8
Graham & Foster-Copartners, etc., *v.* Goodcell, Collector, S. Ct. No. 36, Oct. Term, 1930	12
Graham *v.* Dupont, 262 U. S. 234, 43 S. Ct. 567	8
Heiner, Collector, *v.* Erie Coal & Coke Co. not reported, decided by U. S. C. C. A. for Third Circuit, July 9, 1930	13
Magee, Percival E. *v.* U. S., S. Ct. No. 65, Oct. Term, 1930	12
Oak Worsted Mills *v.* U. S., S. Ct. No. 104, Oct. Term, 1930	12
Russell, Benjamin, et al. *v.* U. S. 278 U. S. 181, 49 S. Ct. 121	11
Stange, Charles H. *v.* U. S., S. Ct. No. 23, Oct. Term, 1930	10
Taft Woolen Company *v.* U. S., S. Ct. No. 105, Oct. Term, 1930	12
Toxaway Mills *v.* U. S., 61 Ct. Cl. 363, Reversed on confession of error, 63 Ct. Cl. 646	7, 8
U. S. *v.* John Barth Company, 279 U. S. 370	3, 8, 9
U. S. *v.* Burden, Smith & Company, 33 F. (2d) 229	12
Wyman, Partridge & Company *v.* U. S. not reported, decided Ct. Cl., June 2, 1930	13

IN THE

Supreme Court of the United States.

OCTOBER, TERM, 1930.

No. 400.

MASCOT OIL COMPANY, INC., PETITIONER,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

On February 17, 1930, the court filed special findings of fact and opinion 37 F. (2d) 986, which were by order entered May 15, 1930, withdrawn and special findings of fact and opinion filed June 2, 1930, which said opinion has not as yet been officially reported but will be found printed at R. 13–16.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered June 2, 1930 (R. 16). Application for writ was presented August 27, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes illegally collected,

jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts of the case are printed in the petition (R. 1-2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

IV.

The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2-4) and to avoid repetition counsel begs leave to refer thereto.

V.

Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding as a matter of law that "the liability for the tax still existed" after the expiration of the statutory period in which the tax legally could be collected.

2. The court below erred in holding that the petitioner is not entitled to recover a tax paid after the running of the statute of limitations against the United States, because the petitioner, after the running of the statute, made a deposit with its bank to insure payment on demand by the collector.

3. The court below erred in holding that the deposit so made was equivalent to a bond given during the statutory period and as a substitute therefor and further erred in holding

that for such reason the decision of this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, should be followed.

4. The court below erred in not holding that the principle stated in the *John Barth Company* case, *supra*, has no application to this case because no bond was given, no new cause of action was created and suit was not on a bond but was brought under Section 3226 of the Revised Statutes.

5. The court below erred in not holding that the principle stated in the *John Barth Company* case, *supra*, has no application to this case because the deposit was made after the expiration of the statutory period for collection.

6. The court below erred in holding that the letter from the petitioner's bank to the collector is a contract and that the collection was based on a valid contract and not on the ground that a tax was due.

7. The court below erred in not holding that the deposit was made merely to insure payment on demand by the collector, which the petitioner could not refuse, and that it had no effect on the statute of limitations and did not create a new cause of action.

8. The court below erred in not holding, in accordance with its special findings of fact, that payment was not made by the bank from the deposit, nor was it made on the basis of the letter from the bank, but was made by the petitioner on demand by the collector.

9. The court below erred in not holding that a waiver of the time for collection obtained from the petitioner after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 is without consideration and is invalid and of no effect.

10. The court below erred in holding that a waiver in which Section 278(d) of the Revenue Act of 1924 is referred to and incorporated should be construed to extend the period defined in Section 250(d) of the Revenue Act of 1921.

11. The court below erred in not holding that the waiver in question by its terms refers to Section 278(d) of the Revenue Act of 1924 and has no application to this case, in which the period of limitations is that defined in Section 250(d) of the Revenue Act of 1921.

12. The court below erred in not holding that the waiver does not meet the requirements of Section 250(d) of the Revenue Act of 1921 that the Commissioner and the taxpayer consent to a later "determination, assessment, and collection of the tax."

13. The court below erred in not holding that the tax in question was illegally collected from the petitioner after the expiration of the period of limitation for collection contained in Section 250 (d) of the Revenue Act of 1921 and after the enactment of Section 1106(a) of the Revenue Act of 1926 which expressly provides that the bar of the statute of limitations against the United States shall extinguish the liability for the tax.

14. The court below erred in not holding that it was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106 (a) as of February 26, 1926, to defeat the right of the petitioner to recover the tax collected from it after the liability therefor had been extinguished.

VI.

The Argument.

Summary of Argument.

A. The "liability for the tax" did not "still exist," after the expiration of the statutory period for collection to defeat the right of the petitioner to recover the tax paid after the statute had run.

B. The deposit with the bank was made after the expiration of the period within which the tax legally could be collected, but which illegal collection the petitioner could not resist. The deposit was made merely to insure the payment of the tax after the running of the statute.

C. The petitioner gave no bond before the expiration of the statutory period and there is no similarity between this case and that of *John Barth Company, supra.*

D. The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.

E. The deposit was made and the waiver was given after the expiration of the statutory period for collection, are without consideration and are invalid and of no force and effect.

F. The waiver refers to and incorporates Section 278(d) of the Revenue Act of 1924 and has no relation to the period defined in Section 250(d) of the Revenue Act of 1921.

G. The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

H. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while it was in force.

3. The collection of the tax was never stayed by the claim in abatement nor otherwise.

4. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

I. Section 611 of the Revenue Act of 1928 if construed to apply to this case, in which the tax was collected after the enactment of 1106(a) of the Revenue Act of 1926, would be unconstitutional because:

1. The power conferred on Congress by the Sixteenth Amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

J. It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

The Argument.

A. *The "liability for the tax" did not "still exist," after the expiration of the statutory period for collection, to defeat the right of the petitioner to recover the tax paid after the statute had run.*

In its opinion and as the basis of its decision the court below stated that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be carefully noted that the court held that the thing that still existed is the liability "for the tax," not the duty to pay the tax after the running of the statute with the right to recover it, but the tax liability, the right and title thereto.

What the court below actually held is that a tax paid after the bar of the statute can not be recovered from the United States. This is the same principle that the court followed in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, in which it stated:

> "* * * The plaintiff's contention that the act furnishes a right to recover all taxes collected after the expiration of five years from the date of the taxpayer's return presents a theory that manifestly can not be sustained unless it be held that the limitation prescribed by the act of 1921 operated not alone upon the remedy but also upon the right of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time. The general rule unquestionably is that the statute of limitations operates only to bar the remedy and does not extinguish the right."

In the *Toxaway Mills* case the Court of Claims misconstrued Section 250(d) of the Revenue Act of 1921 and completely ignored Sections 3224, 3220 and 3226 of the Revised Statutes. The decision in the *Toxaway Mills* case was reversed on confession of error by the Solicitor General and should not have been followed in this case, 63 Ct. Cl. 646.

The petitioner submits that this case involves the same question as was involved in *Toxaway Mills, supra,* in which error was confessed and that the decision below conflicts with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, 47 S. Ct. 389, and in *Graham* v. *Dupont,* 262 U. S. 234, 43 S. Ct. 567, and that the writ should be granted and the Court of Claims reversed.

B. *The deposit with the bank was made after the expiration of the period within which the tax legally could be collected, but which illegal collection the petitioner could not resist. The deposit was made merely to insure the payment of the tax after the running of the statute.*

After the statute had run against the United States it was still within the power of the collector to make the illegal collection of the amount of the tax. This the petitioner could not resist. It could not enjoin the collector, *Graham* v. *Dupont, supra,* but the petitioner could pay the tax and then recover it back, *Ellay Company* v. *Bowers,* 25 F. (2d) 637, certiorari denied 48 S. Ct. 601.

The purpose of the deposit was merely to insure payment of the amount of the tax after the statute had run. This amount the petitioner had the right to pay and recover by complying with sections 3220 and 3226 of the Revised Statutes.

The deposit of the fund with the bank with instructions to pay the collector on demand should certainly have no greater effect than actual payment. Had the tax been actually paid the petitioner could recover under the decision in the *Ellay Company* case, *supra.*

C. *The petitioner gave no bond before the expiration of the statutory period and there is no similarity between this case and that of John Barth Company, supra.*

The petitioner submits that there is no similarity between this case and that of the *United States* v. *John Barth Company,*

279 U. S. 370, 49 S. Ct. 366, which the court below referred to and followed.

The *John Barth Company* case was a suit on a bond provided for by section 234(a) paragraph 14(a) of the Revenue Act of 1918 (40 Stat. 1079), which bond this Court held created a cause of action separate and distinct from an action to collect taxes. In the present case the suit is not on a bond nor is it based on the fact that the deposit was made. The Court's attention is called to the further fact that the collection of the tax was not made from the deposit but from the petitioner in the same manner as a tax is ordinarily collected, the collector having elected to proceed against the petitioner and to ignore the deposit and the bank with which made.

In the *John Barth Company* case, the bond was given before the expiration of the statutory period and as a substitute therefor. In the course of the opinion, Chief Justice Taft referred to the fact that "the bond was given well within the five years after the return" and stated, "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had." In the present case the deposit was made well after the expiration of the five years and question here involved is altogether different from that under consideration in the *John Barth Company* case.

The question here involved is one of importance for the reason that the practice of making a deposit to insure the collection of the tax has been resorted to in numerous instances and this Court should pass on the validity and effect of a deposit as a substitute for a bond. The Commissioner of Internal Revenue has treated the question here involved as one of importance and has published the decision of the court below in full in the Internal Revenue Bulletin, Volume IX-28-4692, and the General Counsel, of the Bureau of Internal Revenue, has made reference to it in G. C. M. 8193, published in the Internal Revenue Bulletin, IX-28-4691.

D. *The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.*

The holding of the court below that "the collection was not made on the ground that the tax was due, but was based on a valid contract to pay a certain amount" is erroneous both in law and fact. It is in direct conflict with the provisions of Section 250(d) of the Revenue Act of 1921 which require the consent in writing of both the Commissioner and the taxpayer. The decision is erroneous in fact because it conflicts with the special finding that collection was made, not from the bank and on the basis of the letter, but from the petitioner as a tax.

E. *The deposit was made and the waiver was given after the expiration of the statutory period for collection, are without consideration and are invalid and of no force and effect.*

The question here involved is similar to that presented to this Court in *Charles H. Stange* v. *United States*, No. 23, October Term, 1930, *Aiken* v. *Commissioner of Internal Revenue*, No. 69, October Term 1930, and *W. P. Brown & Sons Lumber Company* v. *Commissioner of Internal Revenue*, No. 115, October Term, 1930, and the petitioner submits that the writ should be granted in this case for the same reason that writs were granted in the cases mentioned. The principle involved is the same, the effect of the running of the statute against the United States. In the *John Barth Company* case, *supra*, this Court did not pass on the effect of a bond, a deposit or a waiver given after the running of the statute. That the question is an open one is evidenced by the granting of the writs in *Stange* and other cases mentioned.

F. *The waiver refers to and incorporates Section 278(d) of the Revenue Act of 1924 and has no relation to the period defined in Section 250(d) of the Revenue Act of 1921.*

The waiver is of the period of limitation for the beginning of distraint or a proceeding in court for the collection of the tax as provided in Section 278 (d) of the existing revenue act, meaning of necessity the Revenue Act of 1924.

Section 278 (d) of the Revenue Act of 1924 is referred to and incorporated in the waiver and the waiver can not be construed to mean that the petitioner referred to or intended to extend any other limitation period. The waiver does not refer to and is not an extension of the period for collection as defined in Section 250 of the Revenue Act of 1921, which under the decision of this Court in *Benjamin Russell et al.* v. *United States*, 278 U. S. 181, 49 S. Ct. 121, is the limitation period applicable to this case.

All that the petitioner and the Commissioner of Internal Revenue have done is to agree to extend a period of limitation which has no application to this case. The waiver is of no effect and the court below erred in failing to so hold.

While consideration of the question here involved may, due to other issues, not be necessary to the decision of this case, the question is of importance for the reason that the form of waiver here under consideration was entered into in numerous other cases and was in common use prior to the decision of the *Russell* case.

G. *The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."*

The waiver is of the time for beginning distraint or suit "for the collection of the tax." Section 250(d) of the Revenue Act of 1921 provides that no suit or proceeding shall be begun after five years from the filing of the return, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The waiver in question is merely of the collection. It is not of the

"determination, assessment, and collection" required by the statute.

H. *The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Company*, 33 F. (2d) 229.

This Court has granted writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 36, October Term, 1930, and to the Court of Claims in *Percival E. Magee* v. *United States*, No. 65, October Term, 1930, *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, and *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, to review the decisions by those courts with reference to the application of Section 611.

Applications for writs in the cases above mentioned were not opposed by the Solicitor General and counsel therefore submits that the writ should be granted in this case.

I. *Section 611 if construed to apply would be unconstitutional.*

AND

J. *It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.*

The questions relating to the constitutionality of Section 611 of the Revenue Act of 1928 if construed to apply to this case in which the tax was collected while Section 1106(a) of the Revenue Act of 1926 was in force and the questions relating

to the power of a subsequent Congress to repeal 1106(a) as of February 26, 1926, are the same as those involved in the cases of *Wyman, Partridge & Company* v. *United States,* decided by the Court of Claims June 2, 1930, and *Heiner, Collector,* v. *Erie Coal and Coke Company,* decided by the United States Circuit Court of Appeals for the Third Circuit on July 9, 1930, in each of which cases the Solicitor General has applied for a writ of certiorari.

Conclusion.

It is, therefore, respectfully submitted that the questions involved in this case with reference to the deposit and to the waiver are substantially the same as those involved in the *Stange* and related cases heretofore mentioned in which writs of certiorari have been granted and that the questions relating to Sections 607 and 611 of the Revenue Act of 1928 and to Section 1106(a) of the Revenue Act of 1926 are the same as those involved in the *Wyman, Partridge & Company* case in which the Solicitor General has applied for a writ. The writ should therefore be granted in this case.

THEODORE B. BENSON,
Counsel for Petitioner.